No. 11-210

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

XAVIER ALVAREZ,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

JEFFREY L. FISHER
Co-Chair, NACDL
AMICUS COMMITTEE
559 Nathan Abbott Way
Stanford, California 94025
Tel: (650) 724-7081

CALDWELL LESLIE & PROCTOR, PC
MICHAEL V SCHAFLER
Counsel of Record
JEFFREY M. CHEMERINSKY
1000 Wilshire Boulevard,
Suite 600
Los Angeles, California 90017
Tel: (213) 629-9040
schafler@caldwell-leslie.com
chemerinsky@caldwell-leslie.com

Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICUS CURIAE*

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers ("NACDL") as *amicus curiae* in support of respondent in *United States v. Alvarez*, No. 11-210.[1]

NACDL is a nonprofit organization with a direct national membership of more than 10,000 attorneys, in addition to more than 35,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association ("ABA") recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files *amicus*

---

[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. After receiving timely notice from *amicus curiae*, the parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk of the Court.

curiae briefs in criminal cases in this Court and other courts.

SUMMARY OF ARGUMENT

Congress is in the midst of a criminalization explosion. Between 2000 and 2007, it has, on average, passed a new criminal law for each week of the year. In 2005-2006 alone, the 109th Congress proposed almost two new non-violent criminal offenses for each day it was in session. Whether its appetite for criminalization stems from a desire to appear "tough on crime" or a collective mentality that societal harms can be solved only through criminalization, its haste to exercise what Professor Herbert Wechsler called "the strongest force that we permit official agencies to bring to bear on individuals" is resulting in the Government's infringement on essential American rights and liberties. Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097, 1098 (1952).

The Stolen Valor Act of 2005 presents a prime example of the problems that can result from Congress's rush to criminalize. On its face, the Stolen Valor Act prohibits an individual's purely verbal or written false claim of having received a military award or decoration—a lie about only one's self. The law, a content-based proscription on speech, does not require that the false statement be made publicly or that it be believed by any listener. It does not require that the misrepresentation harm anyone or that it be

made for the purpose of receiving anything of value. The speaker's intent in making the false claim is irrelevant, and there are no exceptions for theatrical performances or satire. Even innocent mistakes can result in imprisonment. In these respects, the Act is unique in the United States Code. The public's primary safeguard against prosecution of innocent mistakes, harmless misrepresentations, and theatrical performances is the Government's promise that it will carefully exercise its discretion in deciding when and against whom to bring charges. That is of little solace and no constitutional significance. Despite the staggering breadth of the law, there was no serious debate about its constitutionality as it made its way through Congress.

The Stolen Valor Act's "false claims" provision, codified at 18 U.S.C. § 704(b), offends the Constitution and infringes on this country's fundamental provision of freedom of expression. It should be struck down based on well-established constitutional principles and doctrine. *First*, even if this Court believes that the Stolen Valor Act has some legitimate and constitutional applications, and even if it were inclined to find that the statute's application to Respondent Xavier Alvarez (or even all of the individuals who have thus far been prosecuted under the Stolen Valor Act) was constitutional, the Act is nonetheless unconstitutionally overbroad on its face. Congress's failure to include a *mens rea* requirement, a public speech requirement, a harm requirement, or even an exception for artistic performances, satire, or innocent mistakes

renders the Act unprecedented in its breadth and likely to chill protected speech. *Second*, irrespective of the level of scrutiny this Court applies, the asserted justifications for the Act are insufficient to support a content-based prohibition on speech.

NACDL recognizes that overcriminalization in itself is not a basis for overturning this law and is cognizant that it is not for this Court or any court to question Congress's wisdom with respect to the laws it enacts or how it enacts them. Rather, it is the responsibility of the judicial branch to measure those laws against the Constitution. NACDL has long been concerned, however, that "expansive and ill-considered criminalization has cast the nation's criminal law enforcement adrift from this anchor." Brian Walsh and Tiffany Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, The Heritage Found. & NACDL, April 2010, at Foreward, vi. Against this backdrop and based on the Constitution, NACDL urges this Court to affirm the decision of the court of appeal and strike the Stolen Valor Act of 2005 as unconstitutional.

ARGUMENT

I. THE STOLEN VALOR ACT AND THE OVERCRIMINALIZATION PHENOMENON

A. The 109th Congress

The 109th Congress was in session from January 4, 2005 through December 8, 2006. It became sometimes

known as the "Do-Nothing Congress." *See* Thomas Mann & Norman Ornstein, *Our Do-Nothing Congress*, Los Angeles Times, Sept. 27, 2006, at Opinion, *available at* http://articles.latimes.com/2006/sep/27/opinion/oe-mann27 (last visited Jan. 17, 2012); Daniel Schorr, *This Do-Nothing Congress Did All the Wrong Things*, Christian Science Monitor, Dec. 15, 2006, at Commentary, *available at* http://www.csmonitor.com/2006/1215/p09s02-cods.html (last visited Jan. 17, 2012). It was in session less than virtually any Congress since World War II. *See* Editorial, *109th Congress' Big Success: Lowering the Achievement Bar*, USA Today, Dec. 10, 2006, *available at* http://www.usatoday.com/news/opinion/editorials/2006-12-10-our-view_x.htm (last visited Jan. 17, 2012); John Cochran, *'Do-Nothing Congress' Raises Critics' Ire*, ABC News, May 12, 2006, *available at* http://abcnews.go.com/Politics/Story?id=1955256&page=1 (last visited Jan 16, 2012); Mann & Ornstein, *supra*.

At least with respect to criminalization, the "Do-Nothing Congress" label was inapt. Despite being in session infrequently, the 109th Congress proposed 203 bills containing 446 new non-violent[2] related criminal offenses. Walsh & Joslyn, at 2, 11. It ultimately

[2] This brief uses the phrase "non-violent offenses" as shorthand for offenses that do not involve either violence, drugs and drug trafficking, pornography, and immigration violations. This brief's use of the term "non-violent offenses" is merely a shorthand description and is not intended to suggest that the excluded offenses are necessarily violent in nature.

enacted 13 of the 203 proposed bills, containing 36 non-violent criminal offenses. *Id.* at 13. But as those critics noted, "[t]he big problem with this Congress is not what it didn't do, it is what it did, and did badly." Mann & Ornstein, *supra*.

B. The Stolen Valor Act of 2005

The 109th Congress passed the Stolen Valor Act of 2005 (the "Act") on December 6, 2006 by unanimous consent in the Senate and voice-vote in the House. On December 20, 2006, President George W. Bush signed it into law. Pub. L. No. 109-437, § 3, 120 Stat. 3266. The Act's stated purpose was "to enhance protections relating to the reputation and meaning of the Medal of Honor and other military decorations and awards." *Id.* The Act amended a law that previously imposed criminal penalties, including imprisonment, on anyone who "knowingly wears, manufactures, or sells any decoration or medal authorized by Congress for the armed forces of the United States...." 18 U.S.C. § 704(a) (2005). The pre-2006 version of Section 704 was in many ways akin to laws proscribing the possession, sale, or manufacture of government badges and identification cards, 18 U.S.C. § 701, or badges or medals of Congressionally incorporated veterans groups, 18 U.S.C. § 705; the wearing or displaying of the sign of the Red Cross, 18 U.S.C. § 706, or the emblem of the 4-H Club, 18 U.S.C. § 707; or the reproduction or use of the character or name of Smokey Bear, 18 U.S.C. § 711, or Woodsy Owl, 18 U.S.C. § 711a. Each permits the Government to charge an

offender with a misdemeanor for his role in an *act* of deception involving a protected emblem, insignia, or character. While the Act also broadened the categories of prohibited conduct regarding military awards and decorations to include purchasing, soliciting for purchase, mailing, shipping, trading, and advertising for sale any military awards or medals, it was another new and novel provision of the Act that went much further and is the subject of this case.

In sub-part (b) of the Act, Congress outlawed a purely verbal or written false claim to having been awarded any military medal or decoration:

> Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.

18 U.S.C. § 704(b). That is, Congress made it illegal to lie or even be mistaken about having received any military award irrespective of whether the statement was made publicly or privately, was made to gain something of value or harm anyone, or even whether the speaker intended his claim to be accepted as true. There is no similar law in the United States Code.

Congress made three findings to support the Act's new and novel basis for criminal prosecution:

> (1) Fraudulent claims surrounding the receipt of the Medal of Honor, the distinguished-service cross, the Navy cross, the Air Force cross, the Purple Heart, and other decorations and medals awarded by the President or the Armed Forces of the United States damage the reputation and meaning of such decorations and medals.
>
> (2) Federal law enforcement officers have limited ability to prosecute fraudulent claims of receipt of military decorations and medals.
>
> (3) Legislative action is necessary to permit law enforcement officers to protect the reputation and meaning of military decorations and medals.

Pub. L. No. 109-437, § 2, 120 Stat. 3266 (2006). Congress made no findings that lying about military medals was actually a significant problem. *Id.*

C. The Stolen Valor Act and the Phenomenon of Overcriminalization

1. The Legion of Federal Criminal Laws

This Court has recognized that "[a]ll are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). It is almost cliché for lawyers and judges to say that ignorance of the law is no defense. "Historically, it was presumed that the law, and especially the criminal

law, was 'definite and knowable,' even by the average person." Walsh & Joslyn, at 4. While that may have been true when criminal laws were primarily directed to prohibiting *malum in se*—"evil in itself"—conduct, it is no longer so.

> Whatever its plausibility centuries ago, the "definite and knowable" claim cannot withstand modern analysis. There has been a "profusion of legislation making otherwise lawful conduct criminal (*malum prohibitum*)." Therefore, even a person with a clear moral compass is frequently unable to determine accurately whether particular conduct is prohibited.... In today's complex society, therefore, a person can reasonably be mistaken about the law.

Joshua Dressler, *Understanding Criminal Law* 166 (3d ed. 2001) (internal quotation marks and citations omitted).

Today, there is no list of all of the federal criminal statutes and regulations currently on the books. Walsh & Joslyn, at 6. Indeed, it may be impossible to compile such a list. *Id*. at 2-4. In the late 1980s, the Department of Justice suggested there were more than 3,000 federal criminal laws. *See* James A. Strazzella, *The Federalization of Criminal Law*, Criminal Justice Section, American Bar Association, 1998, at 94. In 1998, an American Bar Association Task Force on the Federalization of Crime concluded that it was virtually impossible to get an accurate count of all of the federal crimes because the statutes are complex, there

are so many, their location in the United States Code and Code of Federal Regulations is so scattered, and there are nearly 10,000 regulations that are nearly impossible to categorize because they mention some sort of criminal or criminal-type sanction. *Id.* at 10. That same ABA Task Force study found that, "of the federal criminal provisions passed into law during the 132-year period from the end of the Civil War to 1996, fully 40 percent were enacted in the years from 1970 to 1996." *Id.* at 7-8.

Ten years after the ABA Task Force report, Professor John S. Baker, Jr., while acknowledging many of the same difficulties as the ABA Task Force in trying to accurately count the total number of federal criminal laws, concluded that by the end of 2007 the United States Code contained at least 4,450 federal criminal laws. John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation Legal Memo. No. 26, June 16, 2008, at 5. Of those 4,450 federal criminal laws, approximately 452—a full ten percent—had been added in the eight years from 2000 through 2007, an average rate of 56.5 new criminal laws per year—*i.e.*, more than one per week. *Id.* at 1-2. Professor Baker commented that this rate is

> roughly the same rate at which Congress created new crimes in the 1980s and 1990s. So for the past twenty-five years, a period over which the growth of federal criminal law has come under increasing scrutiny, Congress

> has been creating over 500 new crimes per decade.

Id. Perhaps out of a desire to appear "tough on crime" or Congress's apparently inevitable response or knee-jerk tendency to any newsworthy problem, Professor Baker found that the rate at which Congress creates criminal laws increases during election years. *Id.* at 2; Brian W. Walsh and Benjamin P. Keane, *Over-criminalization and the Constitution*, Heritage Foundation Legal Memo. No. 64, April 13, 2011, at 3-5.

2. The Problems of Overcriminalization

Frequently swept aside by the current flood of federal criminalization is the notion that conceptualizing and drafting criminal prohibitions and punishment demands deliberation and debate. Walsh & Joslyn, at 2. In the 109th Congress, for example, legislators proposed 446 new non-violent offenses contained in 203 bills—a staggering number, which does not even account for all of the offenses relating to drugs, firearms, pornography, or immigration—making it unreasonable to expect that each could receive the necessary attention and consideration. *Id.* Consequently, many of these laws are poorly drafted, inadequately conceived, and constitutionally flawed. *Id.* This is particularly problematic in the area of criminal law with its power to prohibit, command, and punish. Academics and criminal defense lawyers have identified numerous concerns about Congress's rush to criminalize. Brian W. Walsh and Benjamin

P. Keane, *Overcriminalization and the Constitution*, Heritage Foundation Legal Memo. No. 64, April 13, 2011, at 2-6; Walsh & Joslyn, at 3-5. These concerns include the following:

> *Overbroad*: Often, Congress's rush to "cure" societal wrongs—even legitimately—can come with unintended consequences in the form of criminalizing innocent, protected, and even beneficial conduct and speech. *United States v. Stevens*, 130 S. Ct. 1577 (2010). Only through careful legislative consideration and deliberation can the process of narrow tailoring occur. Indeed, federal criminal statues often prohibit such a broad swath of conduct that few lawyers, let alone non-lawyers, could determine what conduct they prohibit and punish. Walsh & Joslyn, at 4.
>
> *Vagueness/Lack of Fair Notice*: The concept of fair notice is rooted in the Constitution's due-process protections. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (internal quotation marks omitted) (quoting *Lanzetta*, 306 U.S. at 453). In other words, "a criminal law must give fair warning of the conduct it makes a crime." *Id.* at 350-51. Yet, in its now decades-long rush to criminalize conduct, Congress is enacting criminal punishments relying on undefined and unlimited phrases like the "intangible right of honest services." 18 U.S.C. § 1346. That law was significantly circumscribed

decades after it was enacted and after thousands of Americans were indicted and imprisoned. *Skilling v. United States*, 130 S. Ct. 2896, 2907 (2010).

No Mens Rea: The *mens rea* requirement has been a part of Anglo-American law since long before the founding of this country, and "requiring the government to prove that a defendant had a guilty mind at the time she committed a guilty act 'is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.'" Walsh & Joslyn, at 3 (citation omitted). This Court has described this principle as being "as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette v. United States*, 342 U.S. 246, 250 (1952). Despite the recognized importance of a *mens rea* requirement, a joint Heritage Foundation and NACDL study concluded that of the thirty-six non-violent offenses introduced during the 109th Congress, a full one-quarter had no *mens rea* requirements whatsoever and almost forty percent had only "weak" *mens rea* requirements.[3] Walsh & Joslyn, at 11-15.

---

[3] The Heritage/NACDL report put offenses in the "weak" category if the statute's "language is reasonably likely to protect from conviction at least some defendants who did not intend to violate a law and did not have knowledge that their conduct was

(Continued on following page)

> *Too Much Prosecutorial Discretion*: Federal overcriminalization results in essentially handing federal prosecutors broad, if not unfettered, control over criminal adjudications and legislative interpretations. Walsh & Keane, at 5-6. The Government's brief in this case notes that it will pursue "carefully chosen prosecutions—where the government can prove that the defendant's claim was false and that he was aware of its falsity—to deter all knowingly false claims to have received military honors." Gov't Br., at 55. But beyond choosing *whom* to prosecute, overcriminalization provides the Government with additional tools regarding *how* to prosecute. "The proliferation of vague and overly broad laws has given federal prosecutors the ability to stack criminal charges against defendants," thereby allowing prosecutors to "jack up the threat value of trial and thereby induce a guilty plea, even if the government's case is weak." Walsh & Keane, at 5 (citation omitted).

All of these concerns are manifest in the Stolen Valor Act.

---

unlawful or sufficiently wrongful to put them on notice of possible criminal responsibility." Walsh & Joslyn, at 15.

3. The Stolen Valor Act as an Example of Overcriminalization

The Stolen Valor Act moved quickly from conception to enactment.[4] It was first proposed in the House of Representatives on July 19, 2005. H.R. 3352: Stolen Valor Act of 2005, http://www.govtrack.us/congress/bill.xpd?bill=h109-3352. It was introduced in the Senate on November 10, 2005. S. 1998: Stolen Valor Act of 2005, http://www.govtrack.us/congress/bill.xpd?bill=s109-1998. The Senate passed its version on September 7, 2006 by unanimous consent—there is no record of who voted for it. *Id.* The House ultimately passed the Senate version by voice-vote on December 6, 2006—again, there is no record of who voted for it. *Id.* Despite the fact that the law contained a content-based proscription on speech, there does not appear

---

[4] The Stolen Valor Act of 2011 is currently pending legislation before both the House (H.R. 1775) and Senate (S. 1728). The bills are currently before the House and Senate Judiciary Committees, respectively. This proposed legislation would strike and replace the current Section 704(b).

Significantly, the Stolen Valor Act of 2011 expands criminal punishment for purely written or verbal misrepresentations regarding any military service in general and is not limited to the receipt of an award or decoration. The proposed law contains at least two important limitations, however. First, the proposal requires the Government to prove that the misrepresentation was knowingly made "with the intent to obtain anything of value." H.R. 1775; S. 1728. The law does not define "anything of value." Second, the law provides that it is a defense to prosecution if the "thing of value" is *de minimis*. H.R. 1775; S. 1728. Setting aside various deficits in the proposed Stolen Valor Act of 2011, the law would ameliorate some of the concerns discussed in this brief.

to have been a serious discussion of the Act's First Amendment implications.

The Stolen Valor Act bears many of the hallmarks of overcriminalization. As discussed in detail below, it is overbroad, vague, lacks a *mens rea* requirement, and provides extensive discretion to federal prosecutors to selectively enforce the law. And for those reasons, this Court should affirm the Court of Appeals.

II. THE STOLEN VALOR ACT IS UNCONSTITUTIONALLY OVERBROAD BECAUSE IT REGULATES SUBSTANTIALLY MORE SPEECH THAN THE CONSTITUTION PERMITS

> "The First Amendment requires that we protect some falsehood in order to protect speech that matters."
>
> —*Gertz v. Robert Welch Inc.*, 418 U.S. 323, 341 (1974)

A. Analytical Framework

The Stolen Valor Act is unconstitutionally overbroad because it criminalizes substantially more speech than may be constitutionally regulated. Even if there are some potentially constitutionally permissible applications of the law, and even if one of those may be its application to Respondent (or to each and every one of the individuals who have thus far been prosecuted under the Act), the numerous instances in which the law criminalizes protected speech compels

the conclusion that the Act is unconstitutional on its face.

In a typical facial attack, a challenger must establish that "'no set of circumstances exists under which [the statute] would be valid' or that the statute lacks any 'plainly legitimate sweep.'" *Stevens*, 130 S. Ct. at 1587 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Washington v. Glucksberg*, 521 U.S. 702, 740 n.7 (1997)). By contrast, according to the Court's overbreadth doctrine, a statute is facially unconstitutional if it prohibits a substantial amount of protected speech as "judged in relation to the statute's plainly legitimate sweep." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (citation omitted); *Virginia v. Hicks*, 539 U.S. 113, 119-20 (2003).

Under the overbreadth doctrine, even an individual whose own speech may constitutionally be prohibited under a given provision is nonetheless permitted to challenge its facial validity because of the threat that the speech of individuals and groups not before the court will be chilled. *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987). In other words, the facial invalidation that overbreadth permits is necessary to protect the First Amendment rights of speakers who may fear challenging the proscription on their own. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985); *Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972) ("This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear

of criminal sanctions provided by a statute susceptible of application to protected expression.").

In order to support a facial overbreadth challenge there must be a "realistic danger" that the provision will significantly compromise speech rights. *Board of Airport Comm'rs*, 482 U.S. at 574. A law will not be facially invalidated simply because it has some conceivably unconstitutional applications. *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). To support a finding that a prohibition on speech is overbroad, there must be a substantial number of instances in which the provision will violate the First Amendment. *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988). Invalidation for overbreadth is "strong medicine" that is not to be "casually employed." *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999).

B. Four Categories of Protected Speech that Are Subject to Prosecution under the Act

There are at least four categories of protected speech that fall within the Act's reach, and make the Act unconstitutionally overbroad.[5] These four

[5] In *United States v. Wilson*, 553 U.S. 285, 293, 297 (2008), the Court articulated the two steps of the overbreadth analysis: (1) construe the statute and then (2) determine whether the statute as construed "criminalizes a substantial amount of protected expressive activity." Here, separating the two steps of analysis

(Continued on following page)

categories of conduct will likely comprise a substantial percentage of the actual violations of the Act, even if they do not constitute a substantial or even cognizable percentage of prosecutions under it.

1. Innocent Mistakes

Although the Government suggests that the statute may be construed in such a way that would incorporate a scienter requirement, Gov't Br., at 16, the text of the law contains no *mens rea* or scienter requirement. Individuals who mistakenly state that they are recipients of Congressional medals are thus covered by the language of the law. The absence of a scienter requirement is especially noticeable in that the statute contains no exceptions for those who are mistaken about whether they were awarded a medal at all or, if so, what particular medal they were awarded. For example, an individual who claimed to have been awarded a Bronze Star when, in fact, he received a Silver Star falls within the textual ambit of the Act. Indeed, the list of medals and honors that appear to fall within the Act's protections is truly extensive. *See* www.usamilitarymedals.com for an exhaustive list of the medals. Similarly, an individual who claims to have been awarded a World War II Army of Occupation Medal, but actually was awarded a World War II Victory Medal would also be guilty of violating the statute.

---

into discrete and separate sections would, for the purposes of discussion, be redundant.

2. Harmless Misrepresentations

The law covers speech even where a misrepresentation causes no harm. The Act contains no requirement that the misrepresentation actually cause any harm to anyone, much less the reputation or morale of the actual recipients of such awards and decorations or the military. The lack of a harm requirement is apparent in two primary ways. First, there is no textual requirement that anyone actually be deceived by the misrepresentation. Therefore, each and every listener may understand that a speaker is a chronic and pathological liar and that nothing the speaker says is truthful; but if the speaker claims to be a congressionally decorated veteran, he has violated the statute.

Additionally, the Act contains no requirement that a listener—even if actually fooled by a false claim to having received a military award—was tangibly harmed by that misrepresentation. There is no requirement under the Act that the listener lose anything of value or that the speaker gain anything. The Act contains no requirement that the listener actually rely on the misrepresentation by, for example, casting a vote that might otherwise be cast for another candidate or spending money in aid of someone claiming to be a struggling congressionally decorated veteran. The absence of a harm requirement is a notable feature of the statute, separating it from other varieties of statutes regulating misrepresentations, such as fraud statutes. *See*, *e.g.*, 18 U.S.C. § 1341. Indeed, there is nothing requiring that the

false claim harm the military, the recipients of the awards, or the reputation of the military—although these are all asserted justifications for the law.

3. Purely Private Speech

The statute punishes purely private speech. There is no requirement that the false representation be made in public. This raises the possibility that a person speaking with even one friend in the privacy of his own home, or a person sending a private letter to a confidant, could be prosecuted, found guilty, and imprisoned under the Act. In fact, the text of the Act does not even require that the speaker intend that anyone hear the claim at all.

4. Playful, Satirical, or Dramatic Claims

The text of the law makes no exception for playful, satirical, or dramatized claims of having received a military medal or award. By the Act's plain language, an actor in a theatrical performance could technically be found guilty of the statute. Famous recent representations of medals being awarded in films include Forrest Gump (Paramount Pictures 1994), Courage Under Fire (Fox 1996), and Saving Private Ryan (Amblin Entertainment et al. 1998). Any one of these depictions fall within the textual ambit of the statute. In fact, even a child pretending to be a war hero and medal recipient could be guilty under the language of the Act. In *Stevens*, this Court struck down a law as unconstitutionally overbroad even

though it contained an exceptions clause exempting depictions that have "serious religious, political, scientific, educational, journalistic, historical, or artistic value." 18 U.S.C. § 48(b). The Stolen Valor Act does not even contain such an exceptions clause.

Also notable and disconcerting is the second part of § 704(b), which includes and punishes "[w]hoever falsely represents himself or herself, verbally or in writing, to have been awarded ... any of the service medals or badges ... , the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item." The meaning of "colorable imitation" in this context is vague and unclear. Does colorable imitation encompass and punish conduct such as someone wearing a fake, but passable as real, Congressional medal and then asserting that he or she was awarded it? Or does "colorable imitation" encompass and punish those who may claim to have been awarded an entirely made up medal, such as a Blue Star, when it is a colorable imitation of a real medal?

C. Even if the Act Includes Certain Punishable Speech, It Must Be Ruled Unconstitutional Because of the Protected Speech that Would Also Be Prohibited

Given these four categories of protected speech that are rendered criminal by the Act—and the countless examples of conduct that falls under each—

this Court should hold that, even if the Court were inclined to rule that the statute has certain lawful applications, the Act as written and enacted is impermissibly overbroad. Although there may be a substantial interest in protecting the integrity of the medal system or in generally discouraging lies regarding military service, there is insufficient justification for the breadth of the Act. That is, although there may be substantial justification for a law that prohibits a candidate in a political contest from claiming to have been awarded a medal in order to help that candidate to raise funds and garner votes, there is insubstantial justification for punishing a comment made by mistake, punishing a comment made in a private conversation, or punishing a comment that was not intended to be believed.

The examples of protected speech swept within the text of the statute are not fanciful or unrealistic. Indeed, the misrepresentation spoken in private may be as common, or even more so, than the misrepresentation spoken in public strategically to gain a benefit. Although in raw numbers the number of instances of conduct where the application of the statute would be unconstitutional may be relatively low, the reality is that the number of permissible applications of the statute will likely be low as well. The plain language of the Act criminalizes speech that is probably relatively rare. However, the overbreadth analysis assesses the ratio of unconstitutional applications relative to the constitutional applications. *Hicks*, 539 U.S. at 119-20. In light of the scope of the

Act's language, this statute criminalizes a substantial amount of protected speech in relation to its legitimate sweep, if any.

D. The Government's Proposed Narrowing Construction Would Not Eliminate the Overbreadth of the Statute

The Government argues that this Court should construe the Act narrowly. For example, the Government requests that the Court read a *mens rea* requirement into the statute. Gov't Br., at 16. It further explains that parody, satire, and hyperbole are also not punishable under the statute because the Act's use of the term "representation" only covers a "presentation of fact." *Id.* at 17. To be sure, NACDL has long argued that "[i]n the absence of a clearly articulated nexus between a person's conduct and his mental culpability, criminal laws subject the innocent to unjust prosecution and punishment for honest mistakes or actions that they had no reason to know are illegal." Walsh & Joslyn, at vi. Thus, the Government is right to recognize that the language of the Act goes much too far and would have to be amended in order for the law to be even arguably constitutional.

But it is not clear that the Government can engraft these limitations onto this statute; the Government's concession that these should be part of the statute certainly does not make it so. *See*, *e.g.*, *Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 252-53 (1999). Indeed, this Court has stated that it "will

not rewrite a ... law to conform it to constitutional requirements ... for doing so would constitute a serious invasion of the legislative domain, and sharply diminish Congress's incentive to draft a narrowly tailored law." *Stevens*, 130 S. Ct. at 1592 (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 884 (1997); *United States v. Treasury Emps.*, 513 U.S. 454, 479 n.26 (1995); *Osborne v. Ohio*, 495 U.S. 103, 121 (1990)).

And even if this Court could amend the statute as the Government suggests, the statute would still be unconstitutionally overbroad. The Government's reading of the statute does nothing to address the vagueness of "colorable imitation," the absence of a harm requirement, and the extent that the statute covers speech that is entirely private.

Further, even if the Court were to vastly narrow the scope of the statute as urged by the Government, there would remain serious concerns of whether the statute provides sufficient notice to the public. The very idea of notice is that people need to be able to easily find and understand the scope of conduct that is criminalized by a statute. If the Court were to narrow the statute in a way that eliminated the constitutional infirmities in this statute, it would require the public to not only look to the United States Code to access the statute, but also to the United States Reports to interpret its scope. Such an onerous requirement violates the very principle of notice: "a criminal statute [must] give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle

is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Harriss*, 347 U.S. 612, 617 (1954).

E. Careful Exercise of Prosecutorial Discretion Is Insufficient to Cure the Constitutional Deficiencies

Although the Government argues that these examples are not likely to be actually prosecuted, the discretion to prosecute vests too great a power with the Government. In what seems to be a hallmark of such overbroad laws, the Government promises to use the law only in "carefully chosen prosecutions—where the Government can prove that the defendant's claim was false and that he was aware of its falsity—to deter all knowingly false claims to have received military honors." Gov't Br., at 55. In *Stevens*, this Court rejected this very notion—that prosecutors' discretion provides sufficient assurance that a broad statute will not be applied in unconstitutional situations. *Stevens*, 130 S. Ct. at 1591 ("[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."). Moreover, the broad discretion the statute vests in the prosecutor—allowing the prosecutors' office on a case-by-case basis to decide whether certain conduct falls under the statute and is deserving of prosecution—is a grounds for finding it unconstitutional. As Justice Breyer

explained in his concurring opinion in *Morales*, a law "is unconstitutional ... [when] the [prosecutor] enjoys too much discretion in *every* case. And if every application of the [statute] represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications." *City of Chicago v. Morales*, 527 U.S. 41, 71 (1999) (Breyer, J., concurring) (emphasis in original).

One may further argue that a jury provides an additional protection, but even if this were true, the price of prosecution in itself is too great a cost. The danger is not merely that a purported violator would be wrongfully convicted, but that he or she would be subject to all of the costs—financial, reputational, and emotional—attendant with governmental prosecution or investigation. Although someone prosecuted for engaging in protected speech may eventually prevail, whether before a jury or before a court of appeals, the costs will be substantial. Moreover, the greatest concern of the overbreadth doctrine is to guard against the chilling of protected speech; the risk of chilling protected speech is not diminished by the possibility that the prosecutor may elect not to bring suit, nor by the chance that a jury may acquit.

F. Case-by-Case Evaluation of the Constitutionality of the Act Does Not Protect Innocent Speakers from Prosecution

Nor is this statute one in which "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its

sanctions, assertedly, may not be applied." *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973). Given the personal and financial costs associated with defending a federal criminal action, and the numerous examples provided above in which applications of this statute would not be constitutionally permissible, it is unreasonable to require each litigant to individually challenge the law as applied to them.

In *Stevens*, this Court struck down on overbreadth grounds a law that had flaws that are strikingly similar to those present in the Stolen Valor Act. In fact, this law is an even stronger case for invalidation. In *Stevens*, there was a documented problem—specifically, "crush videos." Here, there are no congressional findings of a problem—for example, there is no evidence of a rise in lies about medals. Moreover, the law that was invalidated in *Stevens* contained an exceptions clause for works of artistic value. This law contains no exceptions clause. Both the Stolen Valor Act and the law invalidated in *Stevens* were vague in key respects—in *Stevens* as to the meaning of cruelty to animals, and here as to the meaning of "colorable imitation." And in both cases the Government promised to address the vast breadth of the statute by using it only responsibly.

* * *

In sum, an overbreadth analysis is especially appropriate for analyzing the Act. Due to its broad reach and unnecessarily expansive scope, the Act runs a strong risk of deterring constitutionally protected

speech. As the Court explained in *Gooding*, the animating fear at the heart of the overbreadth doctrine is that "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Gooding*, 405 U.S. at 520-21. Here, because of the possibility for ambiguity and uncertainty over the statute, in light of its broad language and expansive scope, the statute may chill permissible speech.

Thus, this Court should strike down the statute based on its "embracing sweep ... over protected expression." *New York v. Ferber*, 458 U.S. 747, 771-72 (1982). The Stolen Valor Act encompasses broad categories of speech that may not be constitutionally regulated. Requiring case-by-case challenges to the law would be burdensome to future litigants and potentially to the courts, as well as place an inappropriate degree of discretion with prosecutors.

III. The Court Should Rule the Law Unconstitutional Because It Is Not Supported by a Sufficient Governmental Interest

The Court should hold that there is insufficient governmental interest to support such a broad law. As the preliminary question in the analysis, this Court will need to decide what level of scrutiny is appropriate for analyzing the statute. The Government advocates for intermediate scrutiny with a breathing-room analysis, and the Respondent advocates for strict

scrutiny. Ultimately, irrespective of what level of scrutiny the Court determines is appropriate, the Court should strike down the law because there is insufficient governmental interest in regulating this type of speech.

There are three potential government interests to justify the Stolen Valor's Act restrictions on speech. Each of these justifications is deeply problematic.

A. Protecting the Honors System Is an Insufficient Justification

First, the Government justifies the Act based on a need to protect the integrity of the medal system. The Government claims an interest in "protecting the reputation and integrity of its military honors system against knowingly false claims. Military awards serve as public symbols of honor and prestige, conveying the Nation's gratitude for acts of valor and sacrifice; and they foster morale, mission accomplishment, and *espirit de corps* within the military." Gov't Br., at 14. The Government further explains that "[f]alse claims to have received military awards undermine the system's ability to fulfill these purposes. In the aggregate, false claims make the public skeptical of all claims to have received awards, and they inhibit the government's efforts to ensure that the armed services and the public perceive awards as going to only the most deserving few." *Id. Amici* Congressional Medal of Honor Foundation makes a similar argument that the "prestigious status associated with the Medal of

Honor, and its power to inspire emulation, is at its peak when our Nation is at war, such as now. Moreover, in our civilian population, the values that imbue the Medal of Honor have never been in higher demand or had such a pronounced need for preservation." Brief of *Amici Curiae* Congressional Medal of Honor Foundation, at 18.

The idea that, but for the Act, the medals and the values they signify would be diminished has several flaws. This argument was convincingly rejected by the District Court in Colorado in another Stolen Valor Act case. That court explained:

> To suggest that the battlefield heroism of our servicemen and women is motivated in any way, let alone in a compelling way, by considerations of whether a medal may be awarded simply defies my comprehension. Indeed, the qualities of character that the medals recognize specifically refute the notion that any such motivation is at play. I find it incredible to suggest that, in the heat of battle, our servicemen and women stop to consider whether they will be awarded a medal before deciding how to respond to an emerging crisis. That is antithetical to the nature of their training, and of their characters. Servicemen and women may be motivated to enlist and fight by the ideals the medals represent, but I give no credence to the notion, and, more to the point, the government has offered no evidence in support of its burden to prove, that the medals themselves provide potential recipients any incentive to act to protect their

> comrades-at-arms or the interests of this nation they have sworn to defend.

United States v. Strandlof, 746 F. Supp. 2d 1183, 1190-91 (D. Colo. 2011).

Further, promoting and protecting a medal system can be accomplished easily through other methods, such as more speech. If the concern is that misrepresentations about military honors is diminishing the honors system, minimizing the impact of those lies can be achieved in one of two ways: by suppressing or preventing lies, which is what the Stolen Valor Act aims to accomplish, or by counter-speech, which is the method historically favored over censorship. Counter-speech can take two forms. Individuals who falsely claim to have received a medal can be exposed by speech denying such an achievement. There are examples of counter-speech working in precisely this context. *See Phoenix Publisher Admits Lies, Resigns*, Los Angeles Times, Dec. 27, 1985, *available at* http://articles.latimes.com/1985-12-27/news/mn-25470_1_phoenix-gazette (last visited Jan. 17, 2012).

Second, at a broader level, positive speech about the significance of these honors can be promoted. In other words, if the Government is truly concerned about the diminishing value of the honors, there is no reason that addressing and punishing those making misrepresentations is the best way to accomplish that goal. The Government could accomplish this goal by promoting a campaign (or campaigns) about the value of the medals and the heroism they embody. For

example, the Government could invest in a database with biographies of the medal winners. Promoting the meaning of these medals and the heroes who were awarded them would do more to honor these individuals and the values they embody than criminalizing misrepresentations.

B. Avoiding the Harms Caused by False Representations about Military Honors Is an Insufficient Justification

Next, some *amici* attempt to justify the Act as necessary to avoid the harm caused by any misrepresentations. This theory is presented in two different forms by several *amici* in support of the Government.

1. Harm to the Listener

One iteration of the harm that the statute aims to curb is the "harm of knowing falsehoods about military honors to listeners who are defrauded by such falsehoods." Brief of Professors Eugene Volokh and James Weinstein as *Amici Curiae* in Support of Petitioner, at 33. Veterans of Foreign Wars also argue, "This case is about theft." *Amicus Curiae* Brief of Veterans of Foreign Wars of the United States et al., at 8. *Amici* Volokh and Weinstein argue that the falsehoods cause harm when people hear and rely upon the lie.

The statute, however, does not require, as an element, that the Government prove any such harm to or reliance by the listener. Indeed, as argued above,

there is no harm requirement whatsoever in the statute. Other statutes criminalize lies or misrepresentations only when there is proof that actual harm, or at least an intent to cause harm, is shown. *See*, *e.g.*, 18 U.S.C. § 1306 (requiring an intent to defraud). This statute simply does not.

Moreover, a falsehood about the receipt of a military honor is not the type of misrepresentation that is inherently harmful to the public. Some laws, such as those criminalizing impersonating a police officer, are justified based on public safety. Wearing a police uniform, or driving a car with sirens, places great authority and coercive power with an individual. Further, in case of an emergency, the public needs to be able to trust the authority that comes with a police officer's uniform without second-guessing whether the individual is truly an officer. To avoid improper use of this coercive power it is necessary to regulate who can wear the uniform. Even given such considerations, the laws regulating the false impersonation of a police officer are written more narrowly than the Stolen Valor Act, requiring at the minimum an actual intent to fraudulently impersonate and more often a requirement that the false representation be conducted with the "purpose to induce another to submit to his or her pretended official authority or to rely upon his or her pretended official acts." Mo. Rev. Stat. § 575.120; La. Rev. Stat. § 14:112.1 ("False personation of a peace officer is the performance of any one or more of the following acts with the intent to injure or defraud or

to obtain or secure any special privilege or advantage."); 21 Okla. Stat. § 264.A (accord).

No such public harm justification can be made for the Act because no presumption of public reliance can be asserted. Falsely believing that someone earned the prestige and honor of a medal is fundamentally different from falsely relying on the authority of a police uniform. In those cases where there is a "public harm" justification for the statute, other criminal laws already cover such conduct.

2. Harm to Medal Recipients

The second type of harm asserted by some supporters of the law is distinct from any reliance argument. Rather, the theory here is that the statute is justified to avoid harming those who actually received these medals, and whose honor may be diminished or degraded when others falsely claim them. This theory is best presented in the *amicus curiae* brief of the Legion of Valor of the United States: "Military medals are a kind of government-issued currency of valor. They represent an official recognition of exemplary service which most people in this country honor and respect. There is a loss, however intangible, when fakers claim honors they have not earned, especially when they can do so with impunity." Brief *Amici Curiae* of the Legion of Valor of the United States et al., at 11; *see also* Brief of Veterans of Foreign Wars, at 20.

The dilution argument again fundamentally misconstrues the meaning and value of these medals. The winners of awards such as the Medal of Honor *are* heroes. The honors that they have earned, based on these historic acts, are not something that can ever be diluted. The idea that the "currency," to borrow *amici*'s word, can ever be diluted relies on an idea that the honors are part of a zero-sum game. The only way one person falsely claiming an honor would dilute another person's honor and valor would be if honor and valor is some sort of finite reservoir and that when one person wrongfully "drinks" out of that reservoir there is less of a supply for those who are truly entitled. But again, this seems antithetical to the very idea of these medals. There is no finite supply. The honor offers an intrinsic recognition of the great heroism and bravery of the recipients. Nothing can dilute this recognition. Rather, the discovery that someone would make a false claim to a military medal suggests the exact opposite is true: the medals are so valuable that some would risk losing their credibility to claim that status. Most importantly, this is all theoretical; there is no evidence that false claims of military value are so frequent as to have the slightest effect in diluting admiration for acts of valor.

Notably, several of the *amici* include (without distinguishing) those who falsely claim military service, not just medals. *See* Brief *Amici Curiae* of the Legion of Valor, at 11 ("The FBI estimates that for every legitimate Navy SEAL team member, there are roughly 300 imposters."); Brief of Veterans of Foreign

Wars, at 13-15 (citing numerous instances of those who falsely claimed military service without distinguishing them from those who falsely claimed medals). Indeed, this theory of harm would extend not only to those awarded medals but to those who falsely claim prior military service. In fact, this harm theory would extend to those who claim any type of service—whether it is community service, pro bono legal service, or local law enforcement service. Just as one could argue that the currency of a medal is degraded by those who falsely claim that they earned it, so too could one argue that the currency and respect that comes with other types of service are degraded by undeserving individuals claiming them.

Finally, it is concerning the extent to which this dilution of the currency of the medals argument may be indistinguishable from simply punishing the speech because it is offensive and unpopular. Any regulation of speech based on the offensiveness of the speech could be justified based on that offensiveness diluting the topic of the speech. For example, laws regulating offensive speech about the civil rights movement or the founding fathers of this country or members of the Supreme Court could all be justified on the need to avoid diluting the accomplishments of the great individuals involved. Such a justification, based on the offensiveness of the speech, as briefly argued below, clearly runs afoul of what is constitutionally permitted.

C. The Law Cannot Be Justified Based on the Offensiveness of the Speech

Third, another justification to support the Act is that false representations disrespect the military, a fundamental institution of extreme national importance as well as national service. In essence, this argument is that the Government wants to ban such speech (falsely claiming to be a medal recipient) because it finds such claims particularly offensive and wrong. A justification based on the offensiveness of the speech, however, would have no basis in constitutional jurisprudence. As this Court repeatedly has stated: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

CONCLUSION

As the district court observed in *Strandlof*, "[w]hat the Supreme Court stated in relation to the impregnable symbolism of the American flag is equally true of the reputation, honor, and dignity of our nation's military decorations: ... 'We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.'" *Strandlof*, 746 F. Supp. 2d at 1191 (citing *Johnson*, 491 U.S. at 419). Those individuals, whose valor is recognized and saluted through the receipt of

these awards, medals, and decorations, fought for certain ideals, among them the freedom of speech and self-expression. By holding firm to these cherished ideals, we honor the military heroes who fought to protect them. The Stolen Valor Act is a misguided attempt to protect these honors. Imprisonment of individuals under a law that contains no *mens rea*, no public speech or harm requirement, and provides no exceptions for satire or artistic performance does not further the stated goals of the Act—it undermines them. Criminal punishment must be reserved for those who are truly deserving and should be done through carefully crafted legislation, especially when the law regulates speech based on its content. For all these reasons, the Stolen Valor Act, which is both unconstitutionally overbroad and not backed by a sufficient governmental interest, should be struck down.

Respectfully submitted,

JEFFREY L. FISHER
Co-Chair, NACDL
AMICUS COMMITTEE
559 Nathan Abbott Way
Stanford, California 94025
Tel: (650) 724-7081

CALDWELL LESLIE & PROCTOR, PC
MICHAEL V SCHAFLER
Counsel of Record
JEFFREY M. CHEMERINSKY
1000 Wilshire Boulevard,
Suite 600
Los Angeles, California 90017
Tel: (213) 629 9040
schafler@caldwell-leslie.com
chemerinsky@caldwell-leslie.com

Attorneys for Amicus Curiae